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Supreme Court, U.S.
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No. 93-895

In The

Supreme Court of the United States

October Term, 1993

DONALD PLUMMER,

Petitioner,

against

SPRINGFIELD TERMINAL RAILWAY COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULES

In addition to Fed. R. Evid. 606(b) cited in the Petition, three rules governing attorney conduct have application in this case. The first is the rule that was articulated by the United States Court of Appeals for the First Circuit in *United States v. Kepreos*, 759 F.2d 961, 967 (1st Cir. 1985), prohibiting counsel from engaging in extrajudicial post-verdict contact with jurors. A copy of the *Kepreos* decision is attached to this Brief in Opposition as *Appendix A*.

The second rule is United States District Court for the District of Maine Local Rule 7(d)(2), which provides in relevant part as follows:

> The Code of Professional Responsibility adopted by this Court is the Code of Professional Responsibility adopted by the Supreme Judicial Court of Maine, as amended from time to time by that Court.

The third rule of attorney conduct having application in this case is Rule 3.7(f) of the Maine Code of Professional Responsibility.[1] That provision provides in relevant part as follows:

> (1) At no time shall a lawyer connected with the trial of a case communicate extrajudicially, directly or indirectly, with a juror[.]
>
> (2) After discharge of a juror from further jury service, a lawyer may ask or answer questions

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[1] Rule 3.7 was amended subsequent to the events at issue in this Petition. The current provision is 3.7(f); formerly, it was 3.7(b). The text has remained unchanged.

> and make comments to the former juror provided the questions or comments are not intended to harass or embarrass the juror or influence the juror's action in future jury service.

Rule 3.7 of the Maine Code of Professional Responsibility is reprinted in its entirety as *Appendix B* to this Brief in Opposition.

STATEMENT OF THE CASE

Defendant generally adopts Plaintiff's Statement of the Case, but wishes to clarify two points. First, Interrogatory No. 6 of the Special Verdict Form reads in its entirety as follows:

> 6. What amount of money would fairly and adequately compensate the plaintiff Donald Plummer for his injuries? Please answer in figures: $___
>
> Please answer in words:
>
> _____ Dollars.
>
> (In determining the total amount of damages, do not make any reduction because of the negligence, if any, of the plaintiff.)

The trial judge's sidebar ruling denying Plaintiff's request for further inquiry of the jury was based on the Court's understandable conclusion that Interrogatory No. 6 was clear on its face. *See* Petition, Appendix A at 3-4.

The second point needing clarification is how (and by whom) the circumstances of the alleged juror confusion were discovered. After the jury had been discharged (but

not from the jury pool, *see* Maine Code of Professional Responsibility Rule 3.7(f)(2)), counsel for Plaintiff approached the jury foreperson and initiated, on his own, the precise inquiry which only moments before the Court had refused to undertake. It is on the basis of information acquired by this extrajudicial post-verdict juror contact that Plaintiff now seeks relief.

ARGUMENT

A. Counsel for Plaintiff's conduct in initiating his extrajudicial post-verdict inquiry of the jury foreperson was illegal, and on this basis alone the Petition should be denied.

Basic fairness dictates that Counsel for Plaintiff should not be allowed to secure for his client the relief sought in this Petition on the basis of conduct violative of *both* a clear directive of the United States Court of Appeals for the First Circuit *and* the applicable Code of Professional Responsibility. *United States v. Kepreos*, 759 F.2d 961, 967 (1st Cir. 1985), prohibits extrajudicial post-verdict juror contact *under any circumstances*; Rule 3.7(f) of the Maine Code of Professional Responsibility prohibits such contact where the jurors are not discharged finally from the jury pool, as was the case here. Accordingly, the Petition should be denied for the reason that the information of alleged juror confusion upon which it is based was discovered illegally.

B. The decision of the United States Court of Appeals for the First Circuit in this case does not conflict with the cases cited by Plaintiff, and therefore the Petition should be denied.

Plaintiff argues that the First Circuit's decision in this case is in conflict with both *Attridge v. Cencorp Div. of Dover Technologies Int'l, Inc.*, 836 F.2d 113 (2nd Cir. 1987) and *McCullough v. Consolidated Rail Corp.*, 937 F.2d 1167 (6th Cir. 1991). Those cases both hold that a trial court does not violate Fed. R. Evid. 606(b) when prior to entry of judgment it "surmises that the verdict announced differs from the result intended," *Attridge*, 836 F.2d at 114, and (1) questions the jurors regarding their understanding of the effect of the verdict, and (2) modifies the verdict to accord with the jury's then-expressed intent. It is Defendant's contention that neither *Attridge* nor *McCullough* are in conflict with the decision of the First Circuit in this case.

Two critical circumstances distinguish this case from the circumstances in *Attridge* and *McCullough*. The first is that here the trial judge did *not* "surmise[] that the verdict announced differ[ed] from the result intended." Rather, as explained above, Plaintiff's post-trial motion was based on information obtained by Plaintiff's counsel through a means that was expressly prohibited by two separate sources of law. The second circumstance is that Plaintiff's motion was filed several days *after* entry of judgment.[2]

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[2] In this regard, it should additionally be emphasized that this Petition was filed more than one year after judgment was entered.

Both of the above-described circumstances go to the very heart of Fed. R. Evid. 606(b) and its function in the federal courts. The advisory committee described three important values sought to be promoted by the Rule: (1) freedom of jury deliberation; (2) stability and finality of jury verdicts; and (3) protection of jurors against annoyance and embarrassment. With regard to counsel for Plaintiff's extrajudicial post-verdict juror contact, even disregarding its illegality, were Plaintiff to be accorded the relief sought in the Petition, the Rule's function in protecting jurors against annoyance and embarrassment would be unavoidably frustrated. With regard to the fact that Plaintiff's motion was filed after entry of judgment, the requested relief would similarly frustrate the Rule's function in safeguarding the stability and finality of jury verdicts.

The post-verdict juror inquiry Plaintiff desires is aimed at ascertaining, not what the jury intended as its verdict, but what the jury intended to be the *effect* of its verdict. *See* Petition, Appendix B at 10-11. *However*, Plaintiff has cited no United States Court of Appeals case where such an inquiry was allowed in the face of both of the above-described circumstances. Indeed, the court in *McCullough* expressly distinguished its case from *Peveto v. Sears, Roebuck & Co.*, 807 F.2d 486 (5th Cir. 1987) and *Continental Casualty Co. v. Howard*, 775 F.2d 876 (7th Cir. 1985), both of which, as here, involved counsel seeking out the jurors after the trial, declaring that "[t]his runs counter to FRE 606(b)'s purpose to protect the jurors from

harassment or embarrassment." *McCullough v. Consolidated Rail Corp.*, 937 F.2d 1167, 1170 (6th Cir. 1991). Further, with regard to the Rule's function in safeguarding the stability and finality of verdicts, the court stated:

> This is not a case like [*Peveto* and *Howard*] where considerable time elapsed before the jurors sought to amend the verdict. Here, only minutes elapsed before the jurors' attempt to rectify their mistake[.]

McCullough, 937 F.2d at 1172.

In sum, the First Circuit's decision in this case conflicts with neither *Attridge* nor *McCullough*, nor any other United States Court of Appeals decision. Considered in the circumstances of this case, the values sought to be promoted by Fed. R. Evid. 606(b) mandated denial of Plaintiff's motion. Accordingly, the Petition should be denied.

CONCLUSION

Counsel for Plaintiff's extrajudicial post-verdict contact with the jury foreperson was illegal, and for this reason alone the Petition should be denied. Further, the decision of the United States Court of Appeals for the First Circuit conflicts with no case cited by Plaintiff. For this additional reason, the Petition should be denied.

Dated: January 4, 1994.

SPRINGFIELD TERMINAL RAILWAY CO.

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APPENDIX A

UNITED STATES of America,
Appellee,

v.

Constantine T. KEPREOS,
Defendant, Appellant.

No. 84-1051.

United States Court of Appeals,
First Circuit.

Argued Nov. 8, 1984.

Decided March 29, 1985.

Rehearing and Rehearing En Banc
Denied April 26, 1985.

Joan A. Lukey, Boston, Mass., by appointment of the court, with whom Hale & Dorr, Boston, Mass., was on brief, for defendant, appellant.

Brackett B. Denniston, III, Asst. U.S. Atty., Boston, Mass., with whom William F. Weld, U.S. Atty., Boston, Mass., was on brief, for appellee.

Before CAMPBELL, Chief Judge, McGOWAN,* Senior Circuit Judge, and TORRUELLA, Circuit Judge.

TORRUELLA, Circuit Judge.

In his second trial, after the first ended in mistrial, a jury found appellant Constantine T. Kepreos guilty of two counts of mail fraud in violation of 18 U.S.C. § 1341 and two counts of Commodity Exchange Act violations under 7 U.S.C. §§ 13(b) and 6o(1). The government charged

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* Of the District of Columbia Circuit, sitting by designation.

appellant and others with engaging in a scheme to defraud investors who had purchased interests in commodity pools operated by two companies, Northeast Investment Services, Inc. (NIS) and Boston Trading Group, Inc. (BTG), both of which were partially owned by appellant.

The indictment alleged that defendants had mailed fraudulent sales literature, and "churned" commodity pools operated by NIS and BTG.[1] Counts in the first category pertained primarily to Northeast, and those in the second primarily to BTG.

Appellant's first trial began on June 13, 1983. His principal defense was that he was unaware of the fraudulent schemes alleged by the government, and that he could not have been expected to recognize them due to certain organic and psychological deficiencies that he suffered. As a result of these alleged deficiencies, he claimed that he lacked the specific intent necessary to support a conviction. After a five-week jury trial, a mistrial was declared because the jury was unable to reach agreement on a verdict.[2]

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[1] The practice known as "churning" is the excessive trading for the primary purpose of obtaining commissions without significant regard to whether the investor realizes a profit or not. *See Miley v. Oppenheimer & Co., Inc.*, 637 F.2d 318, 324 (5th Cir.1981); *Van Alen v. Dominick & Dominick, Inc.*, 560 F.2d 547, 549 (2d Cir.1977); *see also Horne v. Francis du Pont & Co.*, 428 F.Supp. 1271, 1274 (D.D.C.1977).

[2] Fifteen counts of the indictment were dismissed at the close of arguments. The jury acquitted appellant on the only wire count left, and was unable to reach a verdict as to the remaining counts.

A second jury trial commenced on October 3, 1983. The government presented forty-seven witnesses and over one hundred and seventy-five exhibits, numbering in the thousands of pages. Appellant called fourteen witnesses and testified in his own defense. The jury found appellant guilty of two counts of mail fraud as to the NIS scheme and two counts of fraud in violation of the Commodity Exchange Act in connection with the BTG scheme. He was acquitted on nine other counts dealing with both schemes, and the jury reported that it was unable to reach an agreement as to three other counts. On January 9, 1984, appellant was sentenced to eighteen months imprisonment and a three-year term of probation.

This appeal essentially arises from the trial court's rulings in four areas: the exclusion of expert psychiatric and psychological testimony offered by appellant; the exclusion in the second trial of a record, admitted in the first trial, that a codefendant who testified for the government had once pleaded guilty to a charge of accepting a bribe as a witness; the denial of appellant's motion seeking that immunity be given to a witness; and, finally, denial of appellant's motion to dismiss the indictment and, otherwise, failure to provide adequate curative actions against alleged prosecutorial misconduct in connection with the prosecutor's contacting of jurors after the first trial.

With this background in mind, we turn to appellant's claims.

I. *Exclusion of Expert Testimony*

Appellant first claims error in the exclusion of expert testimony by the district court. He offered this testimony to show that he suffered from physical and psychological difficulties which adversely influenced his ability to attend to subtle details in his surroundings and to draw conclusions therefrom. The evidence was excluded by the trial court.

Appellant contends that the expert testimony was relevant to the issue of his intent. It was offered, he argues, not to show diminished capacity or lack of capacity to form specific intent, but to present an expert basis for his lack of awareness as to the existence of schemes to defraud. Appellant also contends that because the testimony was exculpatory and critical to his defense, its exclusion violated his sixth amendment right to present a defense and rebut the Government's charges.

Rule 403 provides that even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." It is well established that district courts have broad discretion to exclude evidence under this rule. *United States v. Hooton*, 662 F.2d 628, 636 (9th Cir.1981), *cert. denied*, 455 U.S. 1004, 102 S.Ct. 1640, 71 L.Ed.2d 873 (1982); *United States v. Medico*, 557 F.2d 309, 317 (2d Cir.), *cert. denied*, 434 U.S. 986, 98 S.Ct. 614, 54 L.Ed.2d 480 (1977). Only in exceptional circumstances

will reversible error be found in the district court's determination of the probative value of testimony in a particular case. *United States v. Schmidt*, 711 F.2d 595, 599 (5th Cir.1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 705, 79 L.Ed.2d 169 (1984). Besides, a wide assortment of relevant evidence is, constitutional arguments notwithstanding, deliberately excluded by trial courts by reason of counterbalancing factors that are believed to be of greater moment than the unfettered admission of relevant testimony. *See Wahrlich v. State of Arizona*, 479 F.2d 1137, 1138 (9th Cir.) (per curiam), *cert. denied*, 414 U.S. 1011, 94 S.Ct. 375, 38 L.Ed.2d 249 (1973); *see also United States v. Schmidt*, *supra*.

With these principles as a framework, we first note that appellant was capable of forming the intent required by the statutes under which he was prosecuted. Kepreos did not rely on an insanity defense, and the evidence in question was allegedly not offered to prove either diminished capacity or lack of capacity to form specific intent. In other words, he did not question his capacity to form intent but nonetheless was interested in having the jury receive psychiatric evidence on such issue.

We find psychiatric testimony in these circumstances to be both misleading and of questionable utility.[3] The district court, therefore, correctly excluded the evidence.

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[3] Both experts had testified on voir dire that appellant had full capacity to deceive, lie, and to control his conduct. Moreover, the relationship between the experts' findings and the capacity to form intent was described as speculative by the psychiatric expert.

United States v. Castell, 584 F.2d 87, 89 (5th Cir.), *cert. denied*, 440 U.S. 925, 99 S.Ct. 1256, 59 L.Ed.2d 480 (1978).[4]

Next, appellant argues that the trial court erred in rejecting the proffered testimony as evidence of character or personality traits under Fed.R.Evid. 404(a)(1) and 405(a). In his view, expert testimony would have shown that he had the following "personality traits": avoidance, denial, repression, naivete, dependency, and tunnel vision.

The term "character trait" is nowhere defined in the Federal Rules of Evidence. There is no indication whatsoever that either the draftmen or Congress had in mind admitting evidence of broad psychological traits or clinical states such as "repression" or "dependency" or the other similar characteristics about which appellant's experts proposed to testify, perhaps most notably "tunnel vision." The trial judge excluded the testimony on the basis of her legitimate concern that it might confuse the jury, an opinion which we fully share. We are thus satisfied that there was no error below on this point. *See United States v. MacDonald*, 688 F.2d 224, 227-28 (4th Cir.1982), *cert. denied*, 459 U.S. 1103, 103 S.Ct. 726, 74 L.Ed.2d 951 (1983).

Appellant's third point with respect to the exclusion of expert testimony relates to the jury instructions given

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[4] We also note that other Circuits have rejected psychiatric testimony when offered not in connection with an insanity defense, but to support a defense of diminished capacity. *See Campbell v. Wainwright*, 738 F.2d 1573, 1582 (11th Cir. 1984); *Muench v. Israel*, 715 F.2d 1124, 1142-44 (7th Cir.1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 2692, 81 L.Ed.2d 878 (1984).

at trial. The court had instructed the jurors that an intent to defraud could be based on a finding of either positive knowledge of events, or a deliberate indifference to them. Nonetheless, appellant contends, the court refused to allow expert testimony that could have rebutted the charge that he was deliberately indifferent. On the basis of the admissible evidence presented, we find that the trial court gave the jury correct instructions on the issue of specific intent. *See United States v. Brien*, 617 F.2d 299, 312 (1st Cir.), *cert. denied sub nom. Labus v. United States*, 446 U.S. 919, 100 S.Ct. 1854, 64 L.Ed.2d 273 (1980). Since the trial court thus acted well within the parameters imposed upon it by the law, we cannot find a violation of constitutional rights in the combination of the district court's valid judgment on proffered evidence and the charge given on the issue of intent.

II. *Other Evidentiary Claims*

In 1976, appellant's codefendant, Richard Shaw, pleaded guilty in a Florida state court to the crime of accepting a bribe as a witness. Adjudication of guilt was withheld pursuant to a procedure established by a Florida statute. *See* West's F.S.A. Sec. 948.01(3). The district court refused to admit evidence of the Florida plea despite appellant's contention that it was relevant to challenge Shaw's credibility. Appellant claims the court committed reversible error in limiting his cross-examination of this witness.

Trial courts are granted broad discretion to determine the scope and extent of cross-examination. *United States v. Honneus*, 508 F.2d 566, 572 (1st Cir. 1974), *cert. denied*, 421

U.S. 948, 95 S.Ct. 1677, 44 L.Ed.2d 101 (1975). However, it is fully recognized that the right of a defendant in a criminal case to establish the bias of witnesses against him through cross-examination is an important component of the sixth amendment right to confrontation. *Davis v. Alaska*, 415 U.S. 308, 315-17, 94 S.Ct. 1105, 1109-10, 39 L.Ed.2d 347 (1974); *United States v. Jarabek*, 726 F.2d 889, 992 (1st Cir.1984). Thus, a trial court may limit cross-examination, but only after there has been permitted a certain threshold level of cross-examination that satisfies the constitutional requirement. *Niziolek v. Ashe*, 694 F.2d 282, 289 (1st Cir.1982). If the jury has sufficient evidence before it bearing on the witness' bias, the court need not permit unending excursions into each and every matter touching upon veracity. *United States v. Fortes*, 619 F.2d 108, 118 (1st Cir.1980).

Under these principles, we see no merit in appellant's argument that the court's decision unduly restricted his constitutional right to impeach the credibility of this witness. Moreover, even if the plea should have been allowed into evidence, we find its exclusion by the district court a harmless error.

First, appellant had abundant opportunity to expose Shaw's motive for testifying and to impeach his credibility generally. Counsel brought out that Shaw had entered into a plea agreement before indictment; that twenty-eight of thirty-one counts against him had been dismissed (hence reducing his maximum punishment by 140 years); and, that the Government had agreed to recommend no more than five years imprisonment. In addition, the jury had other information on Shaw's major role in the fraud, including his alleged receipt of over

$1,000,000. The court gave an accomplice-witness instruction urging the jury to exercise caution as to any such testimony. The only restriction imposed by the district court referred to Shaw's plea. Under these circumstances, the court did not deny appellant "the constitutionally required threshold level of inquiry" into a government witness' motivation for testifying. *United States v. Tracey*, 675 F.2d 433, 437 (1st Cir.1982).

Second, Shaw's testimony was in any event only corroborative in that a great deal of evidence from other sources was presented on the same issues that Shaw referred to in his testimony. We thus are convinced that the judgment was not substantially swayed by any potential error and that, if in fact there was an error, it had but slight effect on the jury.

III. *Pullen's Testimony*

At trial, appellant sought to offer the testimony of Robert B. Pullen, the President and Chief Financial Officer of First Pullen Commodity Services, Inc. (First Pullen). First Pullen was the futures commission firm responsible for executing commodities transactions for BTG and NIS. Pullen was the individual at First Pullen who received and transmitted trade orders from and to NIS and BTG.

Anticipating that Pullen would assert his Fifth Amendment privilege against self-incrimination during appellant's trial, appellant's counsel requested that the Government grant immunity to Pullen. Having been denied this request, appellant's counsel filed a motion in the district court asking the court either to immunize

Pullen, to order the Government to grant Pullen use immunity, or to dismiss the indictment with prejudice. The court rejected these alternatives. Nevertheless, appellant was given the opportunity to read into the record testimony given by Pullen before a grand jury in previous proceedings. This testimony was substantially equivalent to that which the appellant had sought to elicit at trial by putting Pullen on the witness stand.

Appellant argues that the failure to immunize Pullen amounted to a denial of due process rights and the right to "compulsory process for obtaining witnesses in his favor" as granted by the sixth amendment. In appellant's view, he was further deprived of due process because of governmental selectiveness in its granting of immunity to other witnesses. This, he claims, rendered the trial fundamentally unfair because it allegedly resulted in the presentation to the jury of only a misleading portion of the whole story. Appellant also contends that said unfairness was later magnified when the Government argued to the jury that Pullen's grand jury testimony should not be given as much weight as the testimony of a live witness.

The fact that Pullen was not given immunity did not prejudice appellant. Pullen provided the same testimony to the grand jury that appellant sought for his own trial. This evidence, albeit read into the record, was admitted at trial. The jury was not deprived of considering the allegedly essential and exculpatory information in appellant's favor. Thus, the judicial fact-finding process has not been rendered unfair because of the absence of Pullen's live testimony. *See United States v. Alessio*, 528 F.2d 1079 (9th Cir.), *cert. denied*, 426 U.S. 948, 96 S.Ct. 3167, 49 L.Ed.2d 1184 (1976).

Furthermore, we cannot conclude that the trial was rendered unfair by the prosecutor's comment that live testimony was more reliable than the written transcript of Pullen's grand jury testimony. Although the comment was less than politic, any difficulty in this regard was corrected when the court gave the jury prompt curative instructions to which appellant did not object. In light of the court's alert and appropriate instructions, we find no prejudice to appellant in the comment by itself or in its allegedly cumulative effect upon the factual image presented to the jury throughout the trial, particularly when considered against a backdrop of overwhelming evidence against appellant.

IV. *Prosecutorial Misconduct*

According to appellant, unbeknownst either to the trial court or to the defense, the Assistant U.S. Attorney contacted at least one of the first trial jurors and learned the purported numerical split, the identity of the jurors who were not persuaded beyond a reasonable doubt, and, further, their reasons for having been unwilling to convict appellant in the first trial.

It was not until the fourth day after the impanelment of the jury in the second trial that the government disclosed the substance of the information in question. By that time, however, the following had already taken place: the impanelment of the jury; opening statements from the parties; the complete direct and cross-examination of one government witness; and, finally, the completion of the direct examination of another. Moreover, after the jury was initially impaneled and excused for the day, the court raised the matter of sharing the information

gained by the government, but to no avail. Defense counsel then stated the need for dismissal, pointing out that appellant would never be able to overcome what she called the "unfair advantage" gained by the government in the jury-selection process and the first three days of the trial.

Appellant contends that this "unfair advantage" deprived him of any opportunity for a fair trial. He urges us to either dismiss the indictment or reverse the conviction and remand the case with appropriate limitations placed on prosecutorial conduct.

We start with the proposition that henceforth this Circuit prohibits the post-verdict interview of jurors by counsel, litigants or their agents except under the supervision of the district court, and then only in such extraordinary situations as are deemed appropriate. Permitting the unbridled interview of jurors could easily lead to their harassment, to the exploitation of their thought processes, and to diminished confidence in jury verdicts, as well as to unbalanced trial results depending unduly on the relative resources of the parties. *See United States v. Moten*, 582 F.2d 654, 665-67 (2d Cir.1978); *Miller v. United States*, 403 F.2d 77, 82 (2d Cir.1968); *Rakes v. United States*, 169 F.2d 739, 745-46 (4th Cir.1948); *Commonwealth v. Fidler*, 377 Mass. 192, 202-03, 385 N.E.2d 513, 519-20 (1979). Such outcomes, or even the appearance of the same, we are not willing to tolerate. Thus, future incidents like the one described above will not be countenanced.

The issue here, however, is whether in the present context the retroactive application of the rule we have just announced should warrant reversal or dismissal.

Ordinarily, questions concerning the ethical behavior of prosecutors are presented in the context of an appeal

by a defendant who complains that an impropriety rendered his conviction invalid. *See Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (failure to disclose exculpatory evidence); *Napue v. Illinois,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) (knowing use of false testimony at trial); *United States v. Basurto,* 497 F.2d 781 (9th Cir.1974) (use of perjured testimony to procure indictments). Where such a basis for the allegations is proven, and the misdeeds are thus found to have impugned the fundamental fairness of the trial, precedent authorizes reversal of the conviction and remand for a new trial. *See Brady v. Maryland, supra.* The dismissal of the indictment has been invoked only in egregious or extreme circumstances. *Ramos Colón v. U.S. Attorney for District of Puerto Rico,* 576 F.2d 1, 4 (1st Cir.1978). Such circumstances are not before us in the present case, particularly when we consider that the prosecutor did not violate any rule in effect at the time of his actions.[5]

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[5] In the Commonwealth of Massachusetts the applicable rule is set out in Massachusetts Supreme Judicial Court Rule 3:07, DR7-108(D), as follows:

> After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated to harass or embarrass the juror or to influence his actions in future jury service.

Subsequent to the effective date of this rule, the Supreme Judicial Court held in *Commonwealth v. Fidler,* 377 Mass. 192, 203, 385 N.E.2d 513, 520 (1979) that "counsel, litigants, and those acting for them may not independently contact jurors after a verdict is rendered." It reasoned

> We think the jury system is best protected by a rule requiring that any post-verdict interviews of jurors by counsel, litigants, or their agents take place under the

Juror contacts in the instant case did not cause any prejudicial evidence to be admitted at trial or any exculpatory evidence to be suppressed from it. Also, defense counsel received a disclosure of the information possessed by the government, even if somewhat tardily.

> supervision and direction of the judge. We decline to permit unrestricted post-trial interviews, as we think such a practice would defeat the important interests protected by restrictions on the use of juror testimony to impeach verdicts. Moreover, permitting unbridled interviews of jurors could lead to harassment of jurors, exploitation of jurors' thought processes, and diminished confidence in jury verdicts. See *United States Moten*, 582 F.2d 654, 664-665 (2d Cir.1978); 51 A.B.A.J., *supra* at 158.

Id. at 202, 385 N.E.2d at 519.

Appellant argues that this decision is a gloss on DR7-108(D), and that because the United States District Court for the District of Massachusetts Local Rule 5(d)(4)(B) adopts as its guide for professional conduct in this case the Massachusetts Code of Professional Responsibility, "as amended from time to time by [the highest court of the commonwealth]," the prosecution here violated both state and federal court ethical standards. However, the Supreme Judicial Court did not cite to DR7-108(D) in *Fidler*, so the federal prosecutor could have believed that *Fidler* applied only to conduct in the state court, and that he was bound only by the language of DR7-108(D), which does not expressly mention seeking prior permission before jury interviews, *see, e.g., Annotated Code of Professional Responsibility* 368 (ABA Found. 1979); *Professional Responsibility* 163 (ABA 1978). In view of the lack of clarity, we shall give the prosecution the benefit of the doubt in this case, while making clear that we concur in the rationale of *Fidler* and will expect counsel to adhere to that rule in the future, not only in the District of Massachusetts and Puerto Rico where there are requirements to this effect in the local courts, but also in the other districts within this circuit.

Although such disclosure took place on the forth day of the trial, the trial lasted six weeks and involved more than 60 witnesses. In addition there is no evidence that contacts with jurors from the first trial resulted in a prejudiced or biased jury for the second trial. Consequently, as a matter of demonstrable reality, the contacts in question did not impugn or distort the fairness and integrity of the judicial fact-finding process in such a way as to warrant, as pressed by appellant, either a reversal or dismissal of the indictment. The trial court therefore, committed no reversible error.

For the reasons stated, the district court is *affirmed.*

APPENDIX B

3.7 Conduct During Litigation

(a) Improper Legal Action. A lawyer shall not file a suit, assert a position, delay a trial, or take other action on behalf of a client when the lawyer knows, or should know, that such action would merely serve to harass or maliciously injure another.

(b) Improper Concealment, Statement or Evidence. A lawyer shall not knowingly make a false statement, conceal information legally required to be revealed, or participate in the creation or preservation of false evidence.

(c) Interest in Litigation. A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) Assert a lien granted by law against the proceeds of such action or litigation to secure the lawyer's fee or expenses. This paragraph does not authorize an attorney to assert a lien on a client's file in order to secure payment of a fee. The assertion of such a lien (if any exists) is improper; and

(2) Contract with a client for a reasonable contingent fee as provided in rule 8.

(d) Financial Assistance. While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical

examination, and expenses of obtaining and presenting evidence.

(e) Adversary Conduct.

(1) In appearing in a professional capacity before a tribunal, a lawyer shall:

(i) Employ, for the purpose of maintaining the causes confided to the lawyer, such means only as are consistent with truth, and shall not seek to mislead the judge, jury, or tribunal by any artifice or false statement of fact or law;

(ii) Disclose unless privileged or irrelevant, the identities of all the clients the lawyer represents.

(2) In appearing in a professional capacity before a tribunal, a lawyer shall not:

(i) Intentionally misquote to a judge, jury, or tribunal the language of a book, statute, or decision or, with knowledge of its invalidity and without disclosing such knowledge, cite as authority, a decision that has been overruled or a statute that has been repealed or declared unconstitutional;

(ii) State or allude to any matter that the lawyer has no reasonable basis to believe is relevant to the case or will not be supported by admissible evidence;

(iii) Ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person;

(iv) Assert personal knowledge of the facts at issue, except when testifying as a witness;

(v) Assert a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but a lawyer may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to the matters stated therein; or

(vi) Engage in undignified or discourteous conduct that is degrading to a tribunal.

(f) Communication With Jurors.

(1) At no time shall a lawyer connected with the trial of a case communicate extrajudicially, directly or indirectly, with a juror, with anyone the lawyer knows to be a member of the pool from which the jury will be selected, or with any member of such person's family.

(2) After discharge of a juror from further jury service, a lawyer may ask or answer questions and make comments to the former juror provided the questions or comments are not intended to harass or embarrass the juror or influence the juror's action in future jury service.

(3) A lawyer shall reveal promptly to the court knowledge of improper conduct by a juror or member of the jury pool, or by another toward a juror or member of the jury pool, or a member of the juror's or jury-pool member's family.

(g) Contact With Witnesses. A lawyer shall not:

(1) Suppress any evidence that the lawyer or a client has a legal obligation to reveal or produce;

(2) Advise, or directly or indirectly cause, a person to hide or to leave the jurisdiction of a tribunal for the

purpose of making that person unavailable as a witness therein; or

(3) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the testimony of the witness or the outcome of the case; but unless prohibited by law, a lawyer may advance, guarantee, or acquiesce in payment of:

(i) Expenses reasonably incurred by a witness in attending or testifying;

(ii) Reasonable compensation to a witness for his loss of time in attending or testifying; and

(iii) A reasonable fee for the professional services of an expert witness.

(h) Contact With Officials.

(1) A lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the lawyer and the judge, official, or employees is such that gifts are customarily given and exchanged. This paragraph does not preclude contributions to election campaigns of public officers.

(2) In the absence of opposing counsel, a lawyer shall not directly or indirectly communicate with or argue before a judge or tribunal upon the merits of a contested matter pending before such judge or tribunal, except in open court; nor shall the lawyer, without furnishing opposing counsel with a copy thereof, address a written communication to a judge or tribunal concerning the

merits of a contested matter pending before such judge or tribunal. This paragraph does not preclude communications permitted by rule of court. For purposes of this paragraph the term "opposing counsel" includes a party who has no counsel.

(i) Duty of Public Prosecutor.

(1) A lawyer shall not institute or cause to be instituted criminal charges when the lawyer knows, or it is obvious, that the charges are not supported by probable cause.

(2) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to a defendant without counsel, of the existence of evidence that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

(3) A public prosecutor or other government lawyer shall not conduct a civil or criminal case against any person whom the lawyer represents or has represented as a client.

(4) A public prosecutor or other government lawyer shall not conduct a civil or criminal case against any person relative to a matter in which the lawyer represents or has represented the complaining witness.

(j) Extra-Judicial Publicity. A lawyer involved in the prosecution or defense of a criminal matter or in representing a party to a civil cause shall not make or participate in making any extra-judicial statement which

poses a substantial danger of interference with the administration of justice.

[Amended effective December 14, 1981; July 1, 1990.]